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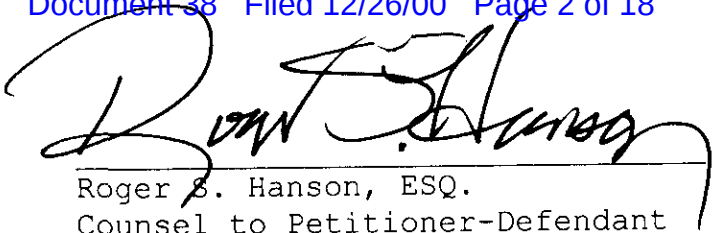
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7 **UNITED STATES DISTRICT COURT**  
8 **DISTRICT OF NEW MEXICO**

9  
10 UNITED STATES OF AMERICA, ) Case No.: 98-DV-1475 *MV/WW*  
11 Plaintiff & Respondent, )  
12 v. ) PROPOSED FINDINGS OF  
13 JOSE GONZALEZ-GONZALEZ, ) FACT/CONCLUSIONS OF LAW  
14 Defendant & Petitioner, on ) EVIDENTIARY HEARING OF  
28 U.S.C. 2255 proceedings. ) Nov. 2, 2000  
Hon. William Deaton  
Chief U.S. Magistrate Judge

15  
16 To the Honorable William Deaton, Chief U.S. Magistrate  
17 Judge District of New Mexico; To the U.S. Attorney, District of  
18 New Mexico by ReneeLyn Camacho, Assistant U.S. Attorney:

19 Defendant-Petitioner Jose Gonzales-Gonzales by his attorney  
20 Roger S. Hanson, submits the following proposed findings of  
21 Fact/Conclusions of Law following the Evidentiary Hearing held  
22 on November 2, 2000, at the U.S. Court House, Albuquerque, New  
23 Mexico, before the Hon. William Deaton, Chief United States  
24 Magistrate Judge.

25 Dated: December 6, 2000, at Santa Ana, California.



Roger S. Hanson, ESQ.  
Counsel to Petitioner-Defendant  
Jose Gonzales-Gonzales

**SUMMARY OF FACTS TESTIFIED TO AT SAID HEARING OF NOVEMBER 2, 2000 (REFERENCED TO TRANSCRIPT, THE ORIGINAL OF WHICH HAS BEEN LODGED WITH THE COURT; E.H.= EVIDENTIARY HEARING AT \_\_\_\_ PAGE & \_\_\_\_ LINE)**

Preliminary proceedings identified 9 Exhibits to be offered by counsel to petitioner. (See page 3, E.H.; see pages 7-9, E.H.) All 9 were admitted at this time save for No.4; E.H. 9, lines 2-8) Nota Bene: Eventually Exhibit 4 was admitted on the Court's own volition; See E.H. \_\_\_\_\_.

#### **EVIDENCE**

1. Charles Benninghoff, ESQ. (E.H. 910) was trial counsel for petitioner Gonzales but was not any longer a Member of the Bar of the Supreme Court of California (E.H. 10-11). Benninghoff had a partner by the name of Martin Molina who also had represented petitioner Gonzalez in various aspects and appearances in U.S. District Court in New Mexico.

Attorney Benninghoff had originally represented petitioner Gonzales in a "writ of error coram nobis" before the Hon. Martha Vasquez, which successfully resulted in the withdrawal of a once-entered plea of guilty (E.H. 11).

As an aside and subsequent to trial, Attorney Benninghoff had suffered some health problems that had affected his memory;

1 two years ago he had suffered a heart attack, requiring three  
2 surgeries, and a loss of blood, resulting in three days of  
3 unconsciousness. One final result of these medical problems was  
4 a loss of memory. (E.H. 11, line 22-E.H. 12, line 13).

5 After the successful withdrawal of a once-entered plea of  
6 guilty, Martin Molina and Benninghoff were further retained to  
7 represent petitioner Gonzales at his trial, although Benninghoff  
8 stated that the goal of both client and counsel was to achieve a  
9 "plea agreement" (E.H. 12-13, especially E.H. 13, lines 1-3).

10 Additional Exhibits 10 & 11 were the attorney-client  
11 agreements between petitioner and counsel Benninghoff, written  
12 in Spanish. (E.H. 12, line 17-E.H. 17, line 11). At the  
13 suggestion of the chief U.S. Magistrate Judge, Exhibits 10 & 11  
14 were offered. (E.H. 17, lines 9-11). (See also E.H. 17, line 17-  
15 E.H. 18, line 25).

16 Benninghoff could not recall defense Exhibits 2 & 3 when  
17 shown to him, Exhibit 2 being an English translation of Exhibit  
18 2. (E.H. 19, line 1-E.H. 20, line 23). The Government prepared  
19 Ex. 3 from Ex. 2. (E.H. 20, lines 17-23)

20 Petitioner Gonzales had personally executed Exhibit 2,  
21 Martin Molina having been dispatched to New Mexico to finalize  
22 the attempted plea bargain. (E.H. 20-22). Petitioner had  
23 affixed his signature on November 2, 1995.  
24  
25

1 Exhibit 5 was a declaration by Attorney Martin Molina which  
2 verified that petitioner had accepted and signed a plea  
3 agreement in anticipation of the final entry of a plea pursuant  
4 to that agreement set for November 8, 1995, before U.S. District  
5 Judge Martha Vasquez. (E.H.22-24) Trial counsel Benninghoff  
6 admitted and acknowledged that Exhibits 2&3 were warnings to  
7 petitioner that he "faced an uphill battle" on the merits of  
8 defending the criminal charges in New Mexico, and thus the  
9 desired move was to negotiate, and eventually accept, a plea  
10 bargain. (E.H. 24, line 4-E.H. 26, line 10) As a consequence,  
11 Mr. Benninghoff and/or his associate, Martin Molina, entered  
12 into plea negotiations with the government, which was culminated  
13 in Exhibit 6 at this Evidentiary hearing. (E.H. 27) The  
14 government prepared the English version of Exhibit 6, which was  
15 then translated into Spanish to enable petitioner Gonzalez to  
16 have complete understanding of it. (E.H. 27-28). The document  
17 appeared to be executed on behalf of the government by "Larry  
18 Gomez for Presiliano Torrez" of the U.S. Attorney's office and  
19 by attorney Charles Benninghoff, that execution occurring on  
20 November 8, 1995. Petitioner Gonzalez had signed it on November  
21 2, 1995, when Benninghoff's associate Martin Molina, had gone to  
22 New Mexico to accomplish this execution and acceptance of the  
23 plea bargain. Benninghoff expressed inability to recall whether  
24 he even went to New Mexico on November 8-9, 1995, but  
25

1 acknowledged that a transcript of the hearing before the Hon.  
2 Martha Vasquez on November 9, 1995, showed his presence and  
3 participation (E.H. 29-30); at this hearing petitioner Gonzalez  
4 was not present, being ill with a kidney stone attack and  
5 confined to a Santa Fe hospital. However, it was clear at that  
6 hearing that the Court expected a plea to be entered and the  
7 case terminated by the written plea agreement that had then been  
8 executed by petitioner, petitioner's counsel, Mr. Benningoff,  
9 and the office of the U.S. Attorney (E.H. 30-32).

10  
11 Mr. Benningoff simply could not "remember" why the plea  
12 bargain was not then finalized to terminate the case; he did not  
13 recall "making the trip" on November 8-9, 1995, and thus could  
14 not remember visiting petitioner Gonzalez either before or after  
15 the live hearing on November 9, 1995. (E.H. 33-34)

16 After the U.S. District Court (Judge Martha Vasquez) had  
17 suggested a hiatus in the proceedings, and use of her  
18 chambers/phones to call Presiliano Torres in Las Cruces,  
19 Benninghoff could not remember whether that phone conversation  
20 had ever occurred. (compare E.H. 34, lines 21-24 with the  
21 invitation of Judge Vasquez made at the November 9, 1995,  
22 hearing). However, clearly, Mr. Torres, acting for the  
23 government, signed the plea agreement that date and Mr.  
24 Benninghoff could not explain, nor could he recall, why he never  
25 brought the matter back before Judge Vasquez to terminate the

1 case. (E.H. 35) He could not recall any further personal or  
2 telephone contact with petitioner after November 9, 1995, but  
3 eventually Defense Exhibit 1 was issued by the clerk, showing  
4 receipt by Benninghoff's office, setting a trial date.

5 Clearly, however, the government had committed to a 10-year  
6 sentence, as acknowledged by the U.S. Magistrate Judge at (E.H.  
7 39, lines 16-18).

8 While Mr. Benninhoff now contended that petitioner  
9 "rejected" the plea bargain on November 9, 1995, defense counsel  
10 again reminded him that petitioner was not even present and thus  
11 could do nothing to alter the fully executed plea agreement  
12 (E.H. 39-40).

14 Between November 9, 1995, and the start of the trial, Mr.  
15 Benninghoff had not returned to New Mexico, but could have  
16 conversed by telephone. (E.H. 42- )

17 In any event, Martin Molina's sworn statement at paragraph  
18 7, page 3 of Exhibit 9, to wit:

19 "On November 8, 1995, during the scheduled change of plea  
20 hearing before the Court, and in the presence of Attorney  
21 Benninghoff, appellant informed the Court that he did not  
22 wish to plead guilty, and wanted, instead to proceed to  
23 trial. Everyone in the courtroom was surprised."

24 Was clearly erroneous not only as to date, but as to  
25 petitioner's alleged presence before the Court, and the claim  
that such had occurred in open Court before Judge Vasquez.

1 The chief U.S. Magistrate Judge termed the declaration an  
2 "obviously self-serving thing Mr. Molina had filed." (E.H. 40-  
3 42).

4 Once again Benninghoff admitted to not going back before  
5 Judge Vasquez between November 9 & December 1, 1995, to enter  
6 the plea agreement and thus end the case which he felt could not  
7 be favorable to petitioner if tried. (R.T.A. 43-46) Benninghoff  
8 could not recall if he had ever presented the fully executed  
9 plea bargain to petitioner on or after November 9, 1995, to  
10 insure that petitioner was aware that the plea bargain had been  
11 fully executed by every one.  
12

13 Benninghoff had been convicted of a federal felony in U.S.  
14 District Court in 1998, in Los Angeles before Judge Rael (sic,  
15 Real, i.e., the Honorable Manuel Real-this spelling correction  
16 by this attorney, Roger S. Hanson, who is familiar with the  
17 federal bench in the Central District of California in Los  
18 Angeles) (E.H. 46-47) Benninghoff believed, however, that it was  
19 petitioner that insisted on going to trial, which was "very much  
20 against my advice," and "I was shocked that he chose to do  
21 that." (E.H. 47-48).

22 2. Jose Gonzalez (E.H. 49) testified in his own behalf. The  
23 initial retainer paid to Charles Benninghoff was for the "writ  
24 of coram novis or something like that," which successfully  
25 resulted in withdrawal of a once-entered plea of guilty. (R.T.A.

1 50) Thereafter petitioner had further retained Benninhoff's  
2 office for subsequent trial, or whatever might thereafter  
3 follow. (E.H. 50-51). The original sentence was for "15 years"  
4 and petitioner had shown that that consequence had not been  
5 fully explained to him; Martin Molina had then been able to work  
6 out the lesser sentence of 10 years, although Molina once told  
7 petitioner that he was trying for "6 to 10 years." (E.H. 51)

8       Petitioner identified Exhibits 2 & 3 as the documents  
9 brought to him by Martin Molina, who told him that he could  
10 possibly move petitioner from Column II to Column I because of  
11 petitioner's previous state conviction being "minimal," and II  
12 "overstated his criminal history." On November 2, 1995,  
13 petitioner executed the plea bargain in the presence of Martin  
14 Molina, (E.H. 51-54), which was Exhibit 6, and petitioner  
15 understood that he would get 10 years, or possibly lower if  
16 counsel could keep him in Column I. (E.H. 54-56) Molina then  
17 left New Mexico, and petitioner only learned of the November 9,  
18 1995, entry of plea hearing that morning when the guards came  
19 to the Estancia, New Mexico facility to take him to Court. (E.H.  
20 57)  
21

22       However, petitioner had suffered from kidney stone pain the  
23 previous evening, and when he was taken to a holding cell in  
24 Santa Fe for the November 9, 1995, appearance he learned that  
25 Judge Vasquez had ordered him to be hospitalized (E.H. 58-59).



1 He received medical treatment, but was not taken to Court to  
2 enter his plea. Benninghoff visited petitioner on the afternoon  
3 of November 9, 1995, discussed the plea bargain being now  
4 executed by everyone, and petitioner told him that he was  
5 satisfied and desired to plead.

6 However, Benninghoff told petitioner that he was going to  
7 try to do even better, and "get another 2 points off." If that  
8 failed, the executed plea bargain would nonetheless be honored.  
9 (E.H. 60-62)

10 Benninghoff told petitioner that the government would  
11 "probably accept the reduction," but that the government wanted  
12 to continue the appearance until January, 1996. (E.H. 62-63)  
13 However, petitioner was then told that he plea agreement "had  
14 not been accepted" and that "they had to go to trial," that  
15 "there had been too many delays," and the judge rejected any  
16 further delay into January 1996, (E.H. 63-64) petitioner  
17 learning of this about a week before trial.

18 The docket sheet revealed a joint motion by both the  
19 government and defense made 12-11-95 to continue a 12-18-95  
20 trial, petitioner believing that all postponements dealt with  
21 dates of entering the plea of guilty.

22 Petitioner did not tell either attorney Molina or attorney  
23 Benninghoff that he did not want the plea bargain and that he  
24 wanted to go to trial. (E.H. 64-65) When Benninghoff told him  
25

1 the judge because he knew Benninghoff to be his counsel, and  
2 believed what Benninghoff had told him. Benninghoff spoke only  
3 English, brought no interpreter, and petitioner had difficulty  
4 in communicating. Molina, who was bilingual, was asserted to be  
5 then "sick in the hospital." (E.H. 65-66) At no time did  
6 Benninghoff explain why he had not gotten back before the Court  
7 the now-executed November 9, 1999, plea bargain. (E.H. 66-67)

8       Petitioner explained his difficulty with his Court-  
9 appointed attorney, one Van Arnum, that led to the initial plea  
10 of guilty, and subsequent withdrawal of it via the Writ of Error  
11 Coram Nobis, and because of those experiences he relied on  
12 Molina and Benninghoff, nor personally addressing the District  
13 Judge. He admitted his complicity in the instant charges, while  
14 denying riding in any vehicle that once went through a west-  
15 bound check point, reversing its direction, and then stopping at  
16 a point westerly of where petitioner was eventually found. (E.H.  
17 67-80)

18       The Government called no witnesses. (E.H. 80, lines 22-23)  
19 Defense counsel Hanson professed inability to determine what  
20 caused the Clerk to set a trial in this cause by the Notice sent  
21 and received by the office of Charles Benninghoff on December 1,  
22 1995. An examination of the Court's file failed to reveal the  
23 answer (E.H. 80-84).  
24  
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1 The Court invited Proposed Findings of Fact (E.H. 84, lines  
2 14-21).

3 Based on the above synopsis of the Evidentiary Hearing held  
4 November 2, 2000, and based on the Plea Transcript of November  
5 9, 1995, of which copies are attached to pleadings in this 2255  
6 petition, Movant and Petitioner Gonzalez-Gonzalez makes the  
7 following:  
8

9 **PROPOSED FINDINGS OF FACT**

- 10 1. The law offices of Charles Benninghoff and Martin Molina  
11 represented petitioner Jose Gonzales-Gonzales at all times  
12 relevant to plea negotiation and eventual trial in this  
13 case in the District of New Mexico in 1995.
- 14 2. Being concerned that petitioner be made aware of the  
15 perceived difficulties in defending the case on its  
16 merits, Benninghoff and Molina caused the preparation of  
17 Defense Exhibit 2, which was translated into English as  
18 Defense Exhibit 3 by the office of the U.S. Attorney in  
19 this District.
- 20 3. On or about November 2, 1995, attorney Martin Molina  
21 personally presented Exhibit 2, to petitioner Gonzales and  
22 discussed its contents and ramifications, securing  
23 petitioner's signature to it.  
24  
25

- 1 4. At the same time and date, a proposed plea bargain was  
2 presented, discussed, and executed as to its acceptance by  
3 petitioner. This was hearing Exhibit 6.
- 4 5. The transcript of a proposed time of entry of plea that  
5 occurred on November 9, 1995, supports the fact that the  
6 petitioner was ill and was at that time confined to a  
7 Santa Fe hospital with knowledge of, and pursuant to the  
8 order of U.S. District Judge Martha Vasquez, before whom  
9 the plea was to be entered.
- 10 6. Assistant U.S. Attorney Larry Gomez appeared for the  
11 government at the hearing and attorney Benninghoff  
12 appeared without his client.
- 13 7. The transcript of the November 9, 1995, hearing reveals a  
14 failure to then obtain acquiesced by AUSA Gomez as to the  
15 prepared plea agreement, and District Judge Vasquez  
16 offered her chambers and phone to AUSA Gomez to call AUSA  
17 Presiliano Torres in Las Cruces.
- 18 8. While the result of any contact between AUSA Gomez and  
19 AUSA Torres is not reported, it can be inferred that Mr.  
20 Gomez subsequently agreed to the plea bargain as written  
21 in Exhibit 6, and did in fact execute it on November 9,  
22 1995.
- 23 9. Charles Benninghoff, counsel to petitioner, executed  
24 Exhibit 6 on November 8, 1995.
- 25

1 10. Therefore upon execution of Exhibit 6 by AUSA Larry Gomez  
2 on November 9, 1995, the plea bargain was fully agreed to  
3 by defendant-petitioner Gonzales, his counsel Charles  
4 Benninghoff, and the Government, acting via AUSA Larry  
5 Gomez.

6 11. This record supports no further effort of either the  
7 defense or the government to recall the case before Judge  
8 Martha Vasquez and the entry of the plea of guilty  
9 pursuant to the provisions<sup>0</sup> of Exhibit 6.

10 12. At the November 2, 2000, Evidentiary Hearing before this  
11 Court, Attorney Benninghoff testified that he had suffered  
12 a heart attack, had extensive surgeries, with loss of  
13 blood, and had been unconscious for several days in 1998;  
14 as a result of his memory of the events of November 9,  
15 1995, were obscured to the extent that he did not remember  
16 coming to New Mexico and appearing at the contemplated  
17 Entry of Plea of Guilty hearing; after the agreement was  
18 duly executed by all parties, he had no memory of why he  
19 did not get the case recalendered before Judge Vasquez; he  
20 did not recall whether or not he had told petitioner  
21 Gonzales about the completed execution of Exhibit 6; he,  
22 presumably, left New Mexico and made nor further  
23 appearance in U.S. District Court.  
24  
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1 13. Petitioner Gonzales-Gonzales testified that Mr.

2 Benninghoff had visited him the afternoon of November 9,  
3 1995, and showed him the completed plea bargain. While  
4 petitioner testified that he wanted to be brought to  
5 Court, he testified that Mr. Benninghoff told him that he  
6 felt he could secure even a better deal, and would advise  
7 him thereof.

8 14. The record indicates that on or about December 1, 1995,  
9 Benninghoff was advised of a December, 1995, trial date;  
10 the record fails to elucidate whether Benninghoff or the  
11 government advised the Court that the plea would not be  
12 presented, or, alternately that the Clerk of the Court set  
13 a trial date, no plea having been presented to Judge  
14 Vasquez.  
15

16 15. The petitioner and Mr. Benninghoff diametrically differ on  
17 the cause of the trial, petitioner asserting that he  
18 desired the honoring of the plea bargain, while Mr.  
19 Benninghoff now asserting that petitioner had insisted on  
20 going to trial.

21 16. Trial occurred before a jury in this District in Las  
22 Cruces, petitioner being convicted, and receiving a  
23 sentence essentially twice as bad as the negotiated plea  
24 of 10 years.  
25

1 17. Petitioner testified that he did not personally urge the  
2 honoring of the fully executed plea bargain because  
3 Benninghoff had told him that Judge Vasquez finally  
4 rejected any plea negotiations and required the trial, and  
5 since Benninghoff was his counsel he did not believe he  
6 could complain to the Court personally about the failure  
7 to honor the plea bargain.

8 18. The Court should now order that the plea bargain be  
9 honored, and petitioner's sentence reduced pursuant  
10 thereto, because:  
11

12 a. A plea bargain for less custodial time is a valuable  
13 asset of a criminal defendant, and fully executed plea  
14 bargain had been consummated at some time on the date  
15 of November 9, 1995.

16 b. The defense attorney fully believing that it was in  
17 the best interests of petitioner Gonzales to plead  
18 guilty, which was supported by hearing Exhibits 2 & 3,  
19 failed to bring the matter back before Judge Vasquez  
20 on either November 9, 1995, or as soon as practicable  
21 thereafter, thus flying in the face of his own  
22 professional judgment that the plea was the most  
23 beneficial path that could be taken.

24 c. The combined fact that attorney Benninghoff was been  
25 convicted of a federal felony in the Central District

1 of California, plus his failure to explain his  
2 inability to get the plea bargain again before Judge  
3 Vasquez supports a conclusion by this Court that  
4 petitioner was denied the effective assistance of  
5 counsel under the guarantees of the Sixth Amendment to  
6 the United States Constitution, and had a more  
7 favorable disposition of his case available via the  
8 plea bargain, which was lost due to trial counsel's  
9 failure to timely return to Court.  
10

11 19. The Court should, therefore, find as a matter of fact and  
12 a series of facts, that petitioner should be given the  
13 benefit of the plea bargain of Exhibit 6, and he should be  
14 re-sentenced accordingly.

15 20. These findings of fact requiring a resentence pursuant to  
16 the plea bargain are now found by this U.S. Magistrate  
17 Judge, and should be/are certified to the Honorable Martha  
18 Vasquez, with the recommendation that the District Court  
19 order petitioner Jose Gonzales-Gonzales be re-sentenced  
20 pursuant to the plea bargain of Exhibit 6.

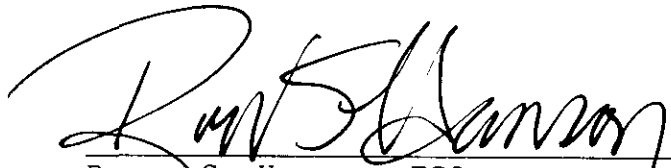
21 21. Where proposed facts are conclusions of law, and vice-  
22 versa, they should be treated as is necessary to carry out  
23 the desired result of a resentence pursuant to Exhibit 6.  
24  
25



1 22. All exhibits are herewith attached and are incorporated by  
2 reference, as is the Plea Entry Transcript of November 9,  
3 1995, before the Honorable Martha Vasquez.

4 23. The original complete transcript of the Evidentiary  
5 Hearing of November 2, 2000, is, likewise, fully  
6 incorporated herein.

7 Dated: December 8, 2000, at Santa Ana, within the Central  
8 District of California.  
9

10 

11 Roger S. Hanson, ESQ.  
12 California Bar 37966  
13 Counsel to Jose Gonzales-Gonzales  
(Not a member of New Mexico Bar)

**THE EXHIBITS ATTACHED TO THIS  
PLEADING ARE TOO VOLUMINOUS TO  
SCAN. SAID EXHIBITS ARE ATTACHED  
TO THE ORIGINAL PLEADING IN THE  
CASE FILE WHICH IS LOCATED IN THE  
RECORDS DEPARTMENT U. S. DISTRICT  
COURT CLERK'S OFFICE.**